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In The

Supreme Court of the United States

October Term, 1984

TOWNSHIP OF WINSLOW, A MUNICIPAL CORPORATION; GARY F. STOWELL, SR., CHIEF OF POLICE, TOWNSHIP OF WINSLOW; DOMINIC MAIESE, MAYOR AND PUBLIC SAFETY DIRECTOR, TOWNSHIP OF WINSLOW,

Petitioners,

vs.

RONALD BOOTH,

Respondent,

and

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

The present petition for a writ of *certiorari* filed by the Township of Winslow and certain Township officials seeks review of an order by the New Jersey Supreme Court declining to review an appellate court decision upholding the constitutionality of the residency exemption for police officers set forth in *N.J.S.A.* 40A:14-122.1. In so doing, the appellate court reversed a trial court decision which granted summary judgment in favor of the municipal de-

fendants and which declared *N.J.S.A.* 40A:14-122.1 to be violative of the Equal Protection Clause of the United States Constitution. The facts leading to this petition may be briefly summarized.

On or about April 17, 1975, respondent Ronald Booth was hired as a police officer by petitioner Township of Winslow (Pa2).* Booth was not a resident of the Township at that time (Pa2). On or about September 28, 1977, the Township enacted Ordinance No. 0-22-77 requiring all municipal officers and employees to reside in the Township as a condition of employment:**

> All municipal officers and employees, other than those exempt by statute, now in the employ or hereafter to be employed by the Township of Winslow are hereby required as a condition of their continued employment to have a place of abode in the Township of Winslow and to be bona fide residents therein.
>
> Those persons presently employed by the Township of Winslow who do not reside in said Township shall have two (2) years from the effective date of this ordinance to become bona fide residents of the Township. (titles omitted) [Pa2].

Booth temporarily resided in the Township from June 1979 to December 1979 (Pa3). At all other times before and after this period, Booth has resided outside the Township (Pa3). On March 7, 1980, the Township terminated Booth's employment with its police department for the sole

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*This notation refers to the appendix to the Petition for a Writ of Certiorari filed by the Township in this matter.

**Although the wording of the ordinance recognizes that certain employees may be exempted from the residency requirement by statute, the Township interprets it to include police officers within its scope in direct contravention of *N.J.S.A.* 40A:14-122.1 (Pa4).

reason that he had failed to comply with the residency ordinance by failing to establish a bona fide residence in the Township.*

On August 18, 1980, Booth filed an action in the Superior Court of New Jersey, Law Division, Camden County against the Township, the Chief of Police and the Mayor and Director of Public Safety seeking reinstatement as a police officer, back wages, benefits and other damages (Pa3). He alleged that the termination of his employment under the defendant's residency ordinance was illegal and void under *N.J.S.A.* 40A:14-122.1 which prohibits the enactment by any municipality of any ordinance requiring police officers to be residents of the municipality.

The Township moved for summary judgment based upon the argument that *N.J.S.A.* 40A:14-122.1 was unconstitutional and thus had no effect on the Township's ability to interpret and implement its residency ordinance to justify the termination of Booth's employment under the ordinance (Pa3).

In an opinion rendered December 14, 1982 (Pa1 to Pa20), the trial court held the statute to be unconstitutional on federal equal protection grounds and thus granted summary judgment for defendants. The trial judge first found that the Township could raise federal constitutional defenses to contest the validity of a state statute in a suit brought against the Township by a private citizen on a nonconstitutional claim (Pa4 to Pa10). Secondly, the trial court determined that, although the Township was

*The Township of Winslow has not adopted the provisions of *N.J.S.A.* 11:1-1.1 *et seq.* (Civil Service) and is therefore not bound by the procedures governing removal of employees under the Civil Service laws.

not alleging that the statute at issue deprived it of equal protection, it had the ability to assert the claim that certain of its employees were being denied equal protection rights by the statutory exemption of police officers from the residency requirement (Pa10 to Pa13). After making these threshold determinations, the trial judge proceeded to find that there was no rational basis for the legislative classifications enabling a municipality to require residency as a condition of employment for officers and employees generally while denying the municipality the ability to impose the same residency requirement on police officers (Pa13 to Pa20). He thus declared the statute to be unconstitutional under the Equal Protection Clause (Pa30). An order granting summary judgment in favor of the Township was entered on December 20, 1982.

Booth filed a Notice of Appeal from the trial court's decision with the Superior Court of New Jersey, Appellate Division on February 7, 1983. In light of the fact that the appeal involved a trial court's declaration of a state statute to be unconstitutional, the Attorney General of New Jersey was contacted by the Clerk of the Appellate Division to ascertain whether the Attorney General would defend the validity of *N.J.S.A.* 40A:14-122.1 on appeal. Pursuant to *N.J. Court Rule* 2:5-1(h), the Attorney General entered this appeal for the purpose of defending the validity of *N.J.S.A.* 40A:14-122.1. Accordingly, the Attorney General filed a brief in support of the constitutionality of *N.J.S.A.* 40A:14-122.1.

In an opinion dated March 15, 1984 (Pa21 to Pa26), the Appellate Division upheld the constitutionality of *N.J.S.A.* 40A:14-122.1, applying a rational basis test. The Court summarized its holding as foliows:

To begin with, we are of the view that the trial judge failed to appreciate the importance of *N.J.S.A.* 40A:14-123.1a, although it constitutes an integral and significant component of the overall police residency scheme. The import of that statute is to minimize the degree of disparity in the treatment of the distinct classes of municipal employees by permitting municipalities to give preferential treatment to qualified residents in making appointments to their police and fire-fighting departments. To that extent, the overall legislative plan permits municipalities to achieve the benefits of a residential connection between police officers and the municipalities they serve without precluding recruitment of officers from a larger pool.

More significant, however, is the presumptive rationality of a class of municipal employees consisting only of police officers and fire fighters. See *Trainor v. City of Newark*, 145 *N.J. Super.* 466, 474 (App. Div. 1976). In dealing with that class, the Legislature has recognized that the ultimate goal of affording the public the benefit of the best possible municipal police and fire fighting forces is affected by conflicting considerations. Thus the municipal ability to recruit the best available applicants may be severely constrained by a residency requirement, and obtaining the benefits of local residency may well result in a compromise in the quality of appointments resulting from a constricted recruitment pool. These are difficult conflicts to resolve. The Legislature has opted to resolve them by a uniform scheme, applicable on a statewide basis, which permits municipalities to require residency as a condition of appointment so long as qualified resident-applicants are available but not as a condition of continued service or promotion. It is not for us to question the wisdom of that scheme or to evaluate it against other alternatives. Our sole task is to determine whether it constitutes a rational response, based on a rational classification, to a governmental problem. We are persuaded that it patently meets this test. [Pa25 to Pa26].

On April 2, 1984, the Township filed a Notice of Appeal and a Notice of Petition for Certification with the Supreme Court of New Jersey. By order dated July 2, 1984, the Supreme Court of New Jersey denied the Petition for Certification and dismissed the Township's appeal (Pa27).

On October 2, 1984, the Township filed the present petition for a writ of *certiorari* to the Supreme Court of New Jersey.

ARGUMENT

Certiorari Should Not Be Granted To Review A State Court Decision Which Does Not Conflict With Applicable Decisions Of The Supreme Court And Where There Are No Special And Important Reasons For Granting The Writ.

It is a fundamental concept that review by the United States Supreme Court on Writ of *Certiorari* "is not a matter of right, but of judicial discretion. . . ." *Supreme Court Rule* 17. Given such discretion, it has been the long-standing practice of the Supreme Court to grant the writ "only when there are special and important reasons therefor." *Ibid.* Further, the Court will generally grant *certiorari* from a state court determination only where the state court has decided a federal question of first impression or in a way in conflict with applicable decisions of the Supreme Court or other courts. *Id., Rule* 17(1) (b and c). None of these reasons exist in the present case, and the petition should therefore be denied.

This case involves a challenge by the Township of Winslow to the constitutionality of the New Jersey legislative scheme which exempts police officers and firefighters from municipal residency requirements which are applicable to other municipal employees. The trial court found the statute at issue, *N.J.S.A.* 40A:14-122.1, violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution since the trial court found there was no rational basis for the statute. The Appellate Division reversed, holding that the exemption of police officers from the local residency requirements met the rational relationship test and thus finding that the challenged statute constitutes a valid exercise of legislative power. A review of the state court's decision reveals that the court's determination applied the appropriate equal protection analysis and was plainly correct. The state court's holding does not conflict with any decision of this Court. Accordingly, the petition for a writ of *certiorari* should be denied.

At the cutset, a brief review of the legislative scheme is helpful. *N.J.S.A.* 40A:14-122.1, enacted in 1972, provides that:

> No municipality shall pass any ordinance resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a police department or force and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect.

This law grants police officers a statutory exemption from local residency requirements applicable to other municipal

officers and employees pursuant to *N.J.S.A.* 40A:9-1.3.* There is also an identical statute exempting members of paid and part-paid fire departments which was simultaneously adopted. *N.J.S.A.* 40A:14-9.1.

The appellate court recognized that these statutes, when adopted in 1972,

> constituted a significant reversal of long-standing legislative policy requiring police officers to reside in the municipality which employed them as a condition both of initial appointment and continued service. See *N.J.S.A.* 40:47-3 and 5, repealed in 1971 by *N.J.S.A.* 40A:14-176 and readopted, respectively, as *N.J.S.A.* 40A:14-122 and 128. And see, generally, *Kennedy v. City of Newark*, 29 *N.J.* 178 (1959); *Mercadante v. The City of Paterson*, 111 *N.J. Super.* 35 (Ch. Div. 1970), aff'd o.b. 58 *N.J.* 112 (1971); *Krzewinski v. Kugler*, 338 *F. Supp.* 492 (D.N.J. 1972). *Cf. Abrahams v. Civ. Serv. Comm.*, 65 *N.J.* 61 (1974).

This change in legislative policy was explained in the Statement of the State Senate Judiciary Committee which accompanied the proposed legislation in 1972. The Statement referred to the severe difficulty many municipalities in New Jersey were facing in recruiting qualified applicants to fill police and fire positions because of the residency requirement and expressed the desirability of having a uniform solution to this problem on a statewide basis. There were also the obvious problems associated with the enforcement of the residency requirement.

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*N.J.S.A. 40A:9-1.3 provides in pertinent part that:

> Unless otherwise provided by law, the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein.

To alleviate these problems, the New Jersey Legislature enacted the statutes at issue exempting police and fire personnel from local residency requirements. At the same time, the 1972 legislation created a preference for a resident seeking either appointment or promotion who achieved the same score as a nonresident on a civil service or merit examination. See *N.J.S.A.* 40A:14-122.3 (repealed) and 122.4. Additionally, in 1976 the State Legislature enacted laws authorizing municipalities to establish preference classes for initial appointment to the police and fire departments and permitting them to exhaust the class of local residents before appointing nonresidents. See *N.J.S.A.* 40A:14-123.1a (police initial appointment preference); *N.J.S.A.* 40A:14-10.1a (fire initial appointment preference). The purpose of the 1976 statute has been described as follows:

> Evidently regarding the limited preference for appointment of residents afforded by the 1972 act as inadequately accommodating the legitimate concerns of the appointing municipality, the Legislature substantially expanded the scope of that preference by its 1976 adoption of *N.J.S.A.* 40A:14-123.1a, the statute here in controversy. The general plan of the statute is to eliminate any promotional preference based on residency but to permit municipalities to classify applicants' initial appointment to police officer positions into four preference classes and to make its appointments from among the eligible candidates of each higher preference class before having to consider the eligible candidates within the next lower preference class. The classes, in order of preference, are municipal residents, other residents of the county, other residents of the State, and all others. [*In re Leary*, 91 *N.J.* 151, 155 (1981)].

See also the Statement accompanying the 1976 statute, which made clear that its intention was to permit a more

substantial preference for local residents on initial appointments. See *Gallagher v. Irvington,* 190 *N.J. Super.* 394, 399 (App. Div. 1983).

After reviewing the entire legislative scheme, the appellate court turned to the standard by which to judge its validity. The court held that the legislative scheme at issue must be measured under the traditional "rational basis" equal protection test rather than the "compelling state interest" test since the statutory classification involved here does not abridge any fundamental rights or discriminate against a suspect class. This threshold determination was clearly correct. See *Abrahams v. Civ. Serv. Comm., supra,* applying a rational basis test rather a compelling state interest test in examining validity of a residency ordinance.

Utilizing the rational relationship test, the appellate court noted that contrary to the conclusion of the trial court, it was satisfied that the classification attacked here met the applicable test and was constitutionally sound. The court reasoned as follows:

> To begin with, we are of the view that the trial judge failed to appreciate the importance of *N.J.S.A.* 40A:14-123.1a, although it constitutes an integral and significant component of the overall police residency scheme. The import of that statute is to minimize the degree of disparity in the treatment of the distinct classes of municipal employees by permitting municipalities to give preferential treatment to qualified residents in making appointments to their police and firefighting departments. To that extent, the overall legislative plan permits municipalities to achieve the benefits of a residential connection between police officers and the municipalities they serve without precluding recruitment of officers from a larger pool.

> More significant, however, is the presumptive rationality of a class of municipal employees consisting only of police officers and fire fighters. See *Trainor v. City of Newark*, 145 *N.J. Super.* 466, 474 (App. Div. 1976). In dealing with that class, the Legislature has recognized that the ultimate goal of affording the public the benefit of the best possible municipal police and fire-fighting forces is affected by conflicting considerations. Thus the municipal ability to recruit the best available applicants may be severely constrained by a residency requirement, and obtaining the benefits of local residency may well result in a compromise in the quality of appointments resulting from a constricted recruitment pool. These are difficult conflicts to resolve. The Legislature has opted to resolve them by a uniform scheme, applicable on a statewide basis, which permits municipalities to require residency as a condition of appointment so long as qualified resident-applicants are available but not as a condition of continued service or promotion. It is not for us to question the wisdom of that scheme or to evaluate it against other alternatives. Our sole task is to determine whether it constitutes a rational response, based on a rational classification, to a governmental problem. We are persuaded that it patently meets this test. [Pa37 to Pa38].

The appellate court thus properly recognized that there is a rational basis for the granting of a statutory exemption for police officers and firefighters from local residency ordinances, *i.e.*, to aid in the recruitment of the best possible candidates for these positions of paramount importance to our societal well-being. It noted that the State Legislature could properly distinguish police and fire personnel from other municipal employees for different treatment in terms of residency requirements. See *Trainor v. City of Newark, supra*, 145 *N.J. Super.* at 474:

> Police and firemen . . . presumptively constitute a class rationally distinguishable from other employees. Police and firemen are required to perform duties which concern the very safety of persons and property. The requirements as to police and firemen appear to be stricter, more exacting and more concerned with the health, welfare and safety of the municipal population and others. [145 *N.J. Super.* at 474: citation omitted].

In light of the important public responsibilities of police officers and firefighters recited above, as well as the difficulties experienced by certain municipalities in recruiting qualified residents, it was rational for the Legislature to determine that these public officers should not be recruited from a relatively limited pool of municipal residents but that all qualified citizens of the State should be able to compete for these positions of paramount public importance. Such a policy could only lead to the hiring of the best qualified applicants for police and fire positions, which is plainly a desirable and legitimate governmental purpose meeting the rational basis test. At the same time, the New Jersey legislative plan is flexible enough to allow municipalities to give hiring and promotional preference to residents, thus fostering the competing goal of having law enforcement officers identify with the community which they serve by residing therein.

As the appellate court recognized, it is not an easy task to reconcile the varied and competing interests in this area. The New Jersey Legislature has done so in a way which does not exclude residents from public safety positions but which enables municipalities to prefer its own residents for these jobs. The Township strenuously asserts that another system is desirable and questions the

wisdom and justice of the residency exemption at issue. However, as the Appellate Division recognized, it is not for the judiciary to entertain and resolve issues of this nature. The policy appeal of the Township must be addressed to the State Legislature. For the present, however, it is clear that the state court's determination was in accord with applicable decisions of this Court.

The Equal Protection Clause does not prohibit mere inequality or difference in treatment. *Dandridge v. Williams*, 397 *U.S.* 471 (1970). State legislatures are allowed considerable leeway to enact legislation that may appear to affect similarly situated people differently. *Clements v. Fashing*, 457 *U.S.* 957 (1982). Legislatures are assumed to have acted constitutionally, *ibid.*, and there is a concomitant presumption that a classification contained within a legislative enactment is reasonable and valid. *Dandridge, supra; Morey v. Doud*, 359 *U.S.* 457 (1957); *Lindsley v. Natural Carbonic Gas Co.*, 220 *U.S.* 61, 78 (1910). A classification such as the one at issue will be set aside only if it is based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify it. *Clements v. Fashing, supra.* If any state of facts reasonably may be conceived to justify it, a statutory classification will not be set aside. *McGowan v. Maryland*, 366 *U.S.* 420, 425 (1961).

In the present case, it was reasonable for the State Legislature to single out police officers and firefighters from other municipal employees for different treatment in terms of residency requirements. Courts have upheld municipal requirements of residency for police officers and firefighters alone. *McCarthy v. Philadelphia Civil*

Service Commission, 424 *U.S.* 645 (1976); *Detroit Police Officers' Ass'n v. Detroit*, 385 *Mich.* 519, 190 *N.W.*2d 97 (Sup. Ct. 1971), app. dism., 405 *U.S.* 950 (1972). See also *Krzewinski v. Kugler*, 338 *F. Supp.* 492 (D.N.J. 1972). These cases support the view that police and fire personnel constitute a class rationally distinguishable from other governmental employees. See also *Trainor v. Newark*, *supra*.

It is precisely because of the demanding responsibilities of police and fire personnel that the Legislature has exempted them from local residency requirements. These officers are charged with the essential duty of enforcing state laws, and have been entrusted with the extensive police power derived from the State to uphold its laws. They are a special kind of public employee, whose primary duty is to enforce and uphold the law. A police officer carries a service revolver at all times. Both police and fire personnel are constantly called upon to exercise tact, restraint and good judgment in dealing with the public. They represent law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public. See *Moorestown Twp. v. Armstrong*, 89 *N.J. Super.* 560, 566 (App. Div. 1965), certif. den. 47 *N.J.* 80 (1966).

The New Jersey Legislature has recognized the special attributes of police officers and firefighters as a class, and there are extensive sections of state law pertaining solely to municipal police, *N.J.S.A.* 40A:14-118 to 175, and to municipal fire personnel, *N.J.S.A.* 40A:14-7 to 105. The statutes at issue are thus part of a comprehensive legislative scheme applicable to police and fire personnel. This furnishes additional support for the legislative recogni-

tion that police officers and firefighters are different from other municipal employees and for the rationality of the residency exemption at issue here.

Thus, the New Jersey law at issue clearly withstands scrutiny under the Township's equal protection attack. The petition for a writ of *certiorari* should therefore be denied.

———o———

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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DATED: November 27, 1984